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In the Supreme Court of the United States

OCTOBER TERM, 1982

KAWASAKI MOTORS CORPORATION, PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals properly determined that petitioner was not prejudiced by the failure of attorneys for the General Counsel to produce certain prior statements of six witnesses at the conclusion of their direct testimony or by other acts of alleged misconduct by these attorneys at the hearing based upon which petitioner was determined to have committed unfair labor practices.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1 to A7) is reported at 691 F.2d 507 (table). The Board's decision and order (Pet. App. B1 to B15) and the decision and order of the administative law judge (Pet. App. C1 to C63) are reported at 257 N.L.R.B. 502.

JURISDICTION

The decision of the court of appeals was issued on September 14, 1982. The petition for writ of certiorari was filed on October 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

The relevant portions of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.* and of the Board's Rules and Regulations are set out at pages 2-3 and 7-8 of the petition.

STATEMENT

A. The Board Proceeding

Petitioner manufactures motorcycles and recreational products at a plant located in Lincoln, Nebraska. In 1978, the International Union, United Automobile, Aerospace and Agricultural Implement Workers ("the Union") sought to qualify as representative of a unit of petitioner's production and maintenance employees and filed a petition for a representational election. An election was held in 1978. Its results were set aside, and a second election was held in April 1979. The Union lost the election and subsequently filed objections to the conduct of the election and unfair labor practice charges with the Board, complaining of violations of Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), in the month preceding the 1979 election (Pet. App. C1 to C2).

Following a hearing on the General Counsel's complaint, the administrative law judge ("ALJ") found that petitioner had engaged in unfair labor practices of "severity, breadth and variety," including repeated threats, promises of benefits, and the discharge of a known union supporter because of his activity during the election campaigns (Pet. App. C12 to C33, C57). The Board affirmed the administrative law judge's findings and ordered petitioner to cease and desist from the unfair labor practices found and to make whole the discharged employee for his losses (Pet. App. B11 to B12).

The questions presented by the petition pertain exclusively to certain alleged procedural irregularities during the administrative hearing. The underlying facts and the Board's rulings relevant to these matters are as follows:

1. The Board's rules and regulations require the administrative law judge, at the conclusion of the General Counsel's direct examination of a witness, to order for the use of

opposing counsel during cross-examination, upon request, the production of any statement of the witness in the government's possession that relates to the subject matter of his testimony. 29 C.F.R. 102.118(b)(1).

At the hearing, which commenced in August 1979, the attorneys for the General Counsel produced the statements of all witnesses as directed by the ALJ, but later discovered in their files additional statements of six witnesses, which had not been produced as required at the close of direct examination. Upon locating these statements, the General Counsel's attorneys promptly turned them over to petitioner's counsel (Tr. 591, 1254, 1298).[1] Two witnesses, Clare and Flores, were still subject to cross-examination when the additional statements were produced and they were subsequently examined by petitioner's counsel regarding the statements (Tr. 591, 597-598, 607, 613-616; R. Ex. 11; Tr. 1250-1251, 1254, 1276-1277; G.C. Ex. 43 and 45). Four witnesses, Moore, Esch, Berg and Harm, had finished testifying when the additional statements were produced, and were made available in November 1979 and January 1980 for the purpose of cross-examination regarding their statements (Tr. 1301, 1327-1332; G.C. Ex. 45; Ct. Ex. 8-11). Petitioner's counsel declined, however, to engage in such cross-examination (Tr. 1430). The statements of these four witnesses did not differ, either in general tenor or in specific factual particulars, from their prior hearing testimony (Pet. App. A3 to A4; Tr. 103-130, 168-183, 277-299; Ct. Ex. 8-11).

Meanwhile, in December 1979, during an adjournment of the Board hearing after they had testified (Tr. 103, 168), witnesses Berg and Harm gave formal statements to a

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[1] "Tr." denotes the transcript of testimony. "G.C. Ex.," "R. Ex.," "Ch. P. Ex.," and "Ct. Ex." denote respectively the hearing exhibits of General Counsel, the Company (the respondent before the Board), the Union (the charging party before the Board), and the ALJ.

Department of Labor investigator regarding events at Kawasaki (Tr. 1417).[2] The General Counsel's attorneys did not possess copies of the Department of Labor statements and did not know of their existence until the Board hearing resumed on January 23, 1980 (Tr. 1410-1411, 1452).[3] At that time petitioner's counsel, who had learned of the statements in December, asked that the General Counsel's attorneys be directed to obtain these statements from the Department of Labor and to produce them for use during further cross-examination of Harm and Berg (Tr. 1418, 1423). The ALJ denied this request, and declined to strike the previous testimony of Harm and Berg (Pet. App. C58; Tr. 1432-1435, 1437). Petitioner's counsel did not attempt to subpoena these statements (Tr. 1411, 1437-1438).

The ALJ denied petitioner's motion for a mistrial based upon improper production of witness statements on the ground that no prejudice had resulted from the omissions of the General Counsel (Pet. App. C58, Tr. 1311, 1432-1438). The ALJ made numerous detailed findings of unfair labor practice violations by petitioner, and did not, in any instance, rely exclusively on the testimony of witnesses

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[2]Petitioner correctly observes (Pet. 8) that the contents of the Department of Labor statements are not described in the present record (Tr. 1417-1418). The administrative law judge indicated to petitioner's counsel that he could subpoena these statements and introduce them in evidence if he wished them to appear in the record (Tr. 1437-1438). Petitioner did not subpoena them.

[3]Petitioner incorrectly asserts (Pet. 8) that the General Counsel "acknowledged the existence and its possession of these Department of Labor affidavits, but intentionally refused to produce them." The record reveals that the General Counsel's attorneys had no knowledge of these statements before learning of them from petitioner's counsel, and at no time had possession of them; and that the administrative law judge refused to order their production at the hearing (Tr. 1410-1411, 1452, 1432-1435).

Clare, Flores, Moore, Esch, Berg, or Harm in finding these violations (Pet. App. A5 to A6, C12 to C56).[4] In at least five instances the ALJ found Section 8(a)(1) violations entirely independently of the testimony of these witnesses (Pet. App. C12 to C20, C26 to C29). The affected witnesses testified to background matters peripherally related to the Section 8(a)(3) allegation regarding employee Bennett, but the administrative law judge did not refer to their testimony in making findings respecting this violation (Pet. App. A6, C36 to C47).

The Board rebuked the General Counsel's attorneys for committing "undisputed errors" in their handling of the witness affidavits contained in the General Counsel's files. However, the Board affirmed the ALJ's finding that the untimely production of witness statements was adequately cured by the offer of further cross-examination and did not result in any prejudice to petitioner's case (Pet. App. B9). The Board also sustained the ALJ's refusal to direct the General Counsel to obtain the Department of Labor affidavits (Pet. App. B9 to B10).

2. Petitioner also alleges that General Counsel's attorneys engaged in improper conduct during the hearing by examining documents on petitioner's counsel's table, surreptitiously attempting to tape record the testimony of a

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[4]Witness Moore had testified exclusively to events surrounding the discharge of witness Clare (Tr. 114-130). The administrative law judge discredited witness Clare and dismissed the allegation concerning her discharge (Pet. App. C47 to C56). Witness Flores, a union representative, did not testify regarding any unfair labor practices (Tr. 1246-1283). Witness Esch's testimony was partly stricken (Tr. 296), and was otherwise corroborative of the credited testimony of other witnesses for one violation (Tr. 93-94, 242-244, 263-265, 274-277). Witness Berg's testimony (Tr. 103-114) was also corroborative of other witnesses (Pet. App. C31 to C32) and was relied on for one violation (Pet. App. C21 to C26). Witness Harm's testimony (Tr. 168-183) was relied on for one violation and supported another (Pet. App. C20 to C21, C34 n.9).

witness called by the General Counsel, and purportedly attempting to conceal exculpatory evidence. The pertinent facts are as follows:

On one occasion during the hearing the General Counsel's trial attorney walked over to petitioner's counsel table to examine an exhibit that had been offered in evidence by petitioner without first being shown to the attorney for the General Counsel. Petitioner's attorney was near the door of the hearing room at the time and immediately objected; the administrative law judge instructed the General Counsel's trial attorney to leave the counsel table, and he complied (Tr. 486-487).[5]

During the hearing, before calling their first witness, the General Counsel's trial attorneys placed a tape recorder on the counsel table in front of them. The administrative law judge noticed it and instructed them to remove it. The General Counsel's attorneys then asked permission to record the testimony of their witness, but permission was refused (Tr. 32-34). They removed the tape recorder and did not subsequently operate it during the hearing (Tr. 34, 1357, 1359).

On the third day of the hearing the administrative law judge learned that the General Counsel's attorneys possessed tape recordings of various pre-election speeches by Company supervisors, one of which, by Company Supervisor Weise, had been alleged to constitute unlawful conduct. The tape recordings had been made informally by employees who attended the meetings. They could not be authenticated, and were nearly unintelligible (Tr. 349, 351-352, 356,

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[5]Contrary to petitioner's statement (Pet. 10), there is no record evidence that the General Counsel's attorney examined, or attempted to examine, petitioner's counsel's notes during the time he was present at petitioner's counsel table (Pet. App. B4 to B5; Tr. 486-487).

463). Because the ALJ threatened to draw an adverse inference if the tapes were not included in the record, the General Counsel introduced nine tapes into evidence, as well as a written text of Supervisor Weise's speech that had not been produced by petitioner's counsel until that day (Tr. 991, 350, 355-356; G.C. Ex. 25-32; Ch. P. Ex. 1).[6] The nine tape recordings were later transcribed by a professional sound studio (Tr. 363-364). During the September adjournment of the hearing, the Board's Regional Director reviewed the written text of Supervisor Weise's speech produced by petitioner and decided to withdraw the Section 8(a)(1) allegation based upon Weise's speech (Tr. 991, 672; R. Ex. 24, at 7). None of the nine transcribed tape recordings related to, or formed the basis for, any unfair labor practice findings by the administrative law judge (Pet. App. B8; Tr. 991-993).

Based upon the foregoing incidents and conduct the administrative law judge repeatedly rebuked the General Counsel's attorneys for their "lack of professionalism" at trial, but determined that a mistrial was not warranted (Pet. App. A2, C58; Tr. 1310-1311, 1602). The Board also criticized the General Counsel's lawyers for their "injudicious conduct" at trial. The Board concluded, however, that petitioner had not suffered prejudice as a result of the conduct of the General Counsel's attorneys, and affirmed the ALJ's denial of a mistrial (Pet. App. B4 to B5, B8, B11, C58).

B. The Decision of the Court of Appeals

The court of appeals denied petitioner's petition for review and enforced the Board's order. Petitioner had not challenged the Board's findings of repeated violations of

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[6]The Weise speech was included in the nine tapes introduced in evidence by the General Counsel. None of the other tape recordings contained evidence of any alleged unfair labor practice (Tr. 326).

Section 8(a)(1) of the Act in the weeks before the election. The court of appeals sustained the Board's finding, which was challenged, that one employee had been illegally discharged for union activities in violation of Section 8(a)(3) of the Act (Pet. App. A2). Turning to the alleged procedural irregularities in the administrative hearing, the court of appeals found that petitioner had not been prejudiced by the General Counsel's untimely production of witness statements at trial, because the statements themselves did not contain "any substantial ammunition for impeachment" and because the testimony of the affected witnesses was not crucial to the outcome of the case (Pet. App. A3 to A4). The court also found "harmless" any abuse of discretion which the administrative law judge may have committed in refusing to order the production of Department of Labor statements, or to strike the testimony of the witnesses who had made the statements, because the Board's conclusion that petitioner had committed unfair labor practices warranting a remedial order would remain undisturbed even if every finding supported by the testimony of these witnesses were to be set aside (Pet. App. A4 to A6). The court also concluded that the Board had properly exercised its discretion by declining to declare a mistrial based upon the General Counsel's trial conduct because petitioner had not been prejudiced by that conduct (Pet. App. A2 to A3, A6).

ARGUMENT

The decision of the court of appeals is a correct application of settled principles to the circumstance of this particular case, and does not conflict with any decision of this Court or any other court of appeals. Further review is accordingly unwarranted.

1. The court of appeals properly rejected petitioner's contention (Pet. 17-18) that the tardy production of statements made by the General Counsel's witnesses required

that the Board's order be set aside. The court below agreed with petitioner that tardy production of witness statements is undesirable and may reduce the effectiveness of cross-examination by affording the party calling the witness a chance to discuss discrepancies between the statements and his previous testimony. However, petitioner did not show that any of the untimely-produced statements differed from any of the witnesses' hearing testimony so as to be of potential use during cross-examination. Moreover, the court of appeals "made an effort to compare the testimony of those witnesses whose statements were produced after the initial cross-examination had been completed" and concluded that the statements were "consistent with the testimony given" and "would not have afforded [petitioner] any substantial ammunition for impeachment" (Pet. App. A3 to A4). Petitioner has not challenged the court of appeals conclusion that because substantial independent evidence supported the Board's determination of unfair labor practice violations deletion of the affected witnesses' testimony would not, in any event, have altered the outcome of the case (Pet. App. A5 to A6).

Contrary to petitioner's further contention (Pet. 14-17), the court of appeals also properly concluded that petitioner was not prejudiced by the administrative law judge's refusal to order production of Department of Labor affidavits in existence at the time witnesses Berg and Harm were made available for additional cross-examination. The court agreed with petitioner that such statements must ordinarily be produced under the court's prior ruling in *Harvey Aluminum (Incorporated)* v. *NLRB*, 335 F.2d 749, 753-755 (9th Cir. 1964). However, the court concluded that the error of the administrative law judge, if any, was "harmless" since the Board's conclusion that petitioner had been guilty of unfair labor practices would retain its validity even if every finding resting in any way upon the affected witness testimony were set aside (Pet. App. A5 to A6). In the absence of

any showing of actual prejudice to petitioner, the court properly declined to overturn the Board's finding and grant a mistrial.

Contrary to petitioner's contention (Pet. 15-16), the decision of the court of appeals does not conflict with decisions of this Court respecting the Jencks Act, 18 U.S.C. 3500.[7] This Court has recognized that improper production of witness affidavits under the Jencks Act is not per se prejudicial and constitutes harmless error absent some showing of actual prejudice to the affected party. *Goldberg* v. *United States*, 425 U.S. 94, 110-111 (1976), on remand, 582 F.2d 483, 490 (9th Cir. 1978); *Killian* v. *United States*, 368 U.S. 231, 243-244 (1961); *Rosenberg* v. *United States*, 360 U.S. 367, 370-371 (1959). The court of appeals' holding is also in accord with rulings of the appellate courts. *NLRB* v. *Seine & Line Fishermen's Union*, 374 F.2d 974, 981 (9th Cir.), cert. denied, 389 U.S. 913 (1967); *Carlisle Paper Box Co.* v. *NLRB*, 398 F.2d 1, 5 (3rd Cir. 1968); *NLRB* v. *Bear Brand Roofing, Inc.*, 312 F.2d 616, 618-619 (10th Cir. 1962); *NLRB* v. *Safeway Steel Scaffolds Co.*, 383 F.2d 273, 278 (5th Cir. 1967), cert. denied, 390 U.S. 955 (1968); *United States* v. *Pope*, 574 F.2d 320, 326 (6th Cir.), cert. denied, 436 U.S. 929, 949 (1978).

In view of the foregoing there is no merit to petitioner's contention (Pet. 8, 15) that the court of appeals "must have presumed" that the Department of Labor affidavits of witnesses Harm and Berg contained no impeaching evidence.

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[7]Contrary to petitioner's apparent contention (Pet. 3-6, 15-17), the Board's rules, not the Jencks Act, govern the production of witness statements in NLRB hearings. 29 C.F.R. 102.118(b)(1); *Ra-Rich Manufacturing Corp.*, 121 N.L.R.B. 700, 701-702 (1958). Case law regarding application of the Jencks Act in criminal proceedings is therefore applicable only by analogy to administrative proceedings before the NLRB, which do not involve the imposition of criminal sanctions.

The fact that the contents of these statements are unknown does not support petitioner's contention for, as the court of appeals observed, numerous unfair labor practices were found which were not based on, or related to, the testimony of the two witnesses who had made statements to the Department of Labor. Thus, even if "any finding dependent upon the affected witnesses were set aside, still the conclusion reached that [petitioner] had been guilty of unfair labor practices would remain" (Pet. App. A6). The court thus did not presume that the Department of Labor affidavits contained no harmless material; in effect it assumed the worst, but recognized that the finding of unfair labor practice liability and the Board's remedial order would not have been different, in any event. The court's finding of harmless error was thus entirely consistent with the strictest possible application of the harmless error doctrine. See *Goldberg* v. *United States, supra,* 425 U.S. at 109-111 & n.21; *NLRB* v. *Safeway Steel Scaffolds Co., supra,* 383 F.2d at 278.[8]

2. Similarly, no issue warranting further review is presented by the court of appeals' disposition of petitioner's objections to the General Counsel's conduct regarding the examination of documents on petitioner's counsel table, the attempt to tape record a General Counsel's witness, and the purported attempt to conceal exculpatory evidence, or to

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[8]Petitioner's contention (Pet. 16) that the General Counsel "intentionally" and "deliberately" refused to produce Department of Labor affidavits misapprehends the procedural record here. The administrative law judge refused to order production of these affidavits; the General Counsel's attorneys' refusal to produce these documents merely accorded with the trial judge's order. If petitioner wished these affidavits to appear in the record it could have subpoenaed them and introduced them in evidence, as the administrative law judge observed (Tr. 1437-1438, 1411). *NLRB* v. *Seine & Line Fishermen's Union, supra,* 374 F.2d at 982.

the cumulative effect of the procedural irregularities at trial. As the court pointed out (Pet. App. A2 to A3):

> The record reveals that the administrative law judge (ALJ) was keenly aware of all the acts of counsel leading to these charges, and on some occasions rebuked counsel quite severely for them. The record does reveal a "lack of professionalism," as the ALJ characterized it, but it does not appear that prejudice resulted. The NLRB, in view of the decision of the ALJ, noted each incident and specifically found that [petitioner] had not been prejudiced. Our review reveals no prejudice.

The holding of the court of appeals is in accord with the established principle that procedural irregularities at trial warrant a new hearing only where actual prejudice has occurred. *Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943); *NLRB* v. *Seine & Line Fishermen's Union*, *supra*, 374 F.2d at 981; *NLRB* v. *Phaostron Instrument & Electronic Co.*, 344 F.2d 855, 858 (9th Cir. 1965); *United States* v. *Pope*, *supra*, 574 F.2d at 326.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfuliy submitted.

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